United Nations A/HRC/33/51/Add.1

General Assembly

Distr.: General
27 July 2016

Original: English

Human Rights Council
Thirty-third session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Turkey

Note by the Secretariat

Turkey has not come to terms with past enforced disappearances in all relevant areas, namely truth, justice, reparation, and memory of the victims. There has been no comprehensive policy to address disappearances. Many families do not know the truth about what happened to their loved ones, there has hardly been a single case of criminal responsibility or civil liability for an act of enforced disappearance, there are no reparation programmes independent from the compensation that may be awarded by a court, nor any effective and accessible social or psychological support for families, and there is no public memorial site or symbolic place for the families — and for society as a whole — to remember the victims and pay tribute to them. This lack of measures to address disappearances results from a combination of factors: mainly the lack of clear political will in all spheres to seriously tackle the issue, combined with legal and other obstacles.

GE.16-12989(E)

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Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Turkey*

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* Circulated in the language of submission only.

I. Introduction

1. A delegation of the Working Group on Enforced or Involuntary Disappearances conducted a five-day official visit to Turkey. The visit took place from 14 to 18 March 2016. The delegation was composed of the Chair of the Working Group, Houria Es-Slami; the Vice-Chair, Bernard Duhaime; and a member of the Working Group, Henrikas Mickevičius.

2. This is the second time that the Working Group has visited Turkey, after a first visit in 1998. A number of recommendations made after the first visit are still valid today.[1]

3. At the outset, the Working Group wishes to thank the Government of Turkey for extending an invitation to visit the country, and for the efforts made before and during the visit, particularly by the Ministry of Foreign Affairs, to facilitate the visit. The Working Group appreciates in particular the Government's facilitating of the visit to the south-eastern city of Diyarbakır, which at the time of the mission was the epicentre of a wide security operation. At the same time, it regrets that it was not possible to hold any meeting at the ministerial level, in spite of the requests of the Working Group, given that during such visits it is important to couple substantive meetings at the working level with meetings with authorities at the decision-making level.

4. The Working Group also wishes to thank the Office of the Resident Coordinator and the United Nations country team in Turkey, as well as the Office of the United Nations High Commissioner for Human Rights, for their support.

5. During its visit, the Working Group visited Ankara, Istanbul and Diyarbakır. The Working Group met with representatives of the General Public Prosecutors' Office of the Supreme Court of Appeal, representatives of the Constitutional Court, the Deputy Under-Secretary of the Ministry of Foreign Affairs, the Deputy Under-Secretary of the Ministry of Justice, the Deputy Under-Secretary of the Under-Secretariat of Public Order and Security, the General Staff, representatives of the Gendarmerie General Command, representatives of the General Directorate of Security, the Human Rights Committee of the Grand National Assembly, the Head of the Council of Forensic Medicine in Istanbul, and the Chief Prosecutor and the Vice-Governor in Diyarbakır.

6. The Working Group met a number of relatives of disappeared persons and also held several meetings with civil society organizations and lawyers.

II. General situation of enforced disappearances in Turkey

7. Over the years, the Working Group has transmitted 202 allegations of enforced or involuntary disappearances to the Government of Turkey, of which 79 are still outstanding. As in most countries in the world, the number of cases registered with the Working Group does not necessarily reflect the real extent of the problem. In Turkey, though, it is particularly difficult to assess the real dimension of the problem and to have exact figures on enforced disappearances, given that past disappearances have not been duly acknowledged, and consequently have not been properly addressed. It is therefore essential, as a matter of utmost priority, to fully recognize the past violations and create a mechanism specifically dedicated to investigating fully the fate and whereabouts of those who

[1] See E/CN.4/1999/62/Add.2.

disappeared during the 1980s and 1990s in order to finally provide truth, justice and reparation to the families concerned.

8. The allegations filed with the Working Group mainly relate to disappearances that occurred between 1992 and 1996 in the south-east of Turkey, with the highest number of cases occurring in 1994. These disappearances occurred mostly in the context of clashes between the Kurdish Workers' Party (PKK) and government security forces in the south-east of the country, where a state of emergency existed at the time.[3] Some of the disappearances allegedly occurred during raids conducted by gendarmes, accompanied at times by village guards — a civil defence corps reportedly armed and paid by the Government to fight the PKK. In some cases, the disappeared persons were members of political opposition parties or were journalists working for newspapers opposed to the Government. Most of the cases followed the same pattern: the disappeared persons were allegedly arrested at their homes on charges of belonging to the PKK and were taken to a police station, but their detention was later denied by the authorities — in most cases police officers or State prosecutors. In many cases, torture or ill-treatment at the hands of the security forces was reported or feared.[4]

9. Turkey has done very little so far to come to terms with past enforced disappearances, as consecutive Turkish governments have been reluctant to engage with the issue and there has therefore been no proactive and comprehensive policy to address the right to truth, justice, reparation and memory of the victims. As a result, many families still do not know the truth about what happened to their loved ones, there has hardly been a single case of criminal responsibility or of civil liability for acts of enforced disappearance, there are no reparation programmes independent from the compensation that may be awarded through judicial proceedings, nor any effective and accessible social or psychological support for families, and there is no public memorial site or symbolic place for the families — and for society as a whole — to remember the victims and pay tribute to them. This lack of measures to address disappearances results from a combination of factors, but is mainly due to the lack of political will in all spheres and at all levels to seriously tackle the issue, which is combined with legal and other obstacles, as illustrated further in the present report.

III. Current situation in the south-east

10. Since July 2015, there has been a resurgence of clashes in the south-east of Turkey between the security forces and the PKK. Round-the-clock curfews have been declared for extensive periods in entire neighbourhoods or cities. The current situation in that part of the country is in fact dramatically similar to that described in the 1998 report of the Working Group. A number of human rights entities have expressed, and continue to express, serious concerns in this regard.[5] The Working Group fully acknowledges the serious security challenges that Turkey is currently facing. It recalls at the same time that there can be no justification for human rights violations, including enforced disappearances, in the name of counter-terrorism measures, in accordance with article 7 of the Declaration on the Protection of All Persons from Enforced Disappearance, of 1992 (hereinafter referred to as the Declaration).

[3] See E/CN.4/1996/38, para. 425.

[4] Ibid.

[5] See E/CN.4/1999/62/Add.2, para. 7.

[6] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17002&LangID=E, www.coe.int/en/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat and CAT/C/TUR/CO/4, paras. 11-14.

11. Although during the visit the Working Group did not receive allegations of recent enforced disappearances,[6] its experience suggests that situations such as the current one in the south-east are conducive to human rights violations, including enforced disappearances. Only a thorough, independent and credible investigation may clarify facts and dispel any doubts as to the nature and extent of the violations occurring on the ground.

12. During its visit, the Working Group heard very troubling testimonies, including of families not being able to have access to the bodies of their loved ones killed during the security operations, and of bodies being disposed of. It also heard allegations of instances of extrajudicial executions and other human rights violations.

13. The Working Group firmly believes that in the current environment it is even more important to come to terms with past violations, as lack of action to address them fosters a culture of impunity which, in turn, may encourage further human rights violations both in the present-day environment and in the future.

Disappearance of migrants transiting through Turkey

14. During the visit, the Working Group received concerning information about the disappearance of migrants in, or transiting through, Turkey. The Working Group received reports of women and children disappearing in trafficking networks, particularly Yazidi women and girls being trafficked from the Syrian Arab Republic to Turkey and sold by Islamic State in Iraq and the Levant (ISIL) in Gaziantep in the south of Turkey. While not all of these may constitute acts of enforced disappearance, according to the information received these acts most often take place with the complicity, or at least the connivance, of local authorities. These very serious allegations deserve a thorough and independent investigation by the Turkish authorities.

IV. Legislation

15. The first legislation-related challenge identified by the Working Group concerns the fact that there is no autonomous criminal offence of enforced disappearance in Turkey, which is an obvious problem when it comes to the investigation, prosecution and adjudication of the acts of enforced or involuntary disappearance. Enforced disappearances are investigated and prosecuted as an element of other criminal offences, such as murder, torture or arbitrary deprivation of liberty. This means that even when the act of enforced disappearance is obvious but the "parent" crime, that is to say, the crime that includes an episode of enforced disappearance, does not reach the required standard of proof, the criminal case is either terminated or the trial ends in an acquittal. This contributes to the public distrust in the judiciary and prosecutorial system, and to the perception of impunity for the perpetrators of enforced disappearances. This lack of trust and shared perception is justified, as only two individuals have been sentenced for committing crimes that included acts of enforced disappearance.[7]

[6] An Urgent Action concerning one individual was sent by the Working Group on 3 June 2016.

[7] The case of Mehmet Şerif Avşar, who was forcibly disappeared in the province of Diyarbakır on 22 April 1994, resulted in five persons being sentenced to six years' imprisonment each for deprivation of liberty and two persons being sentenced to 30 years' imprisonment each for murder. The case of Şevhmus Yavuz, who was forcibly disappeared in the province of Diyarbakır on 11 March 1994, resulted in one person being sentenced to 10 years' imprisonment for murder.

16. In compliance with its obligations under the Declaration, Turkey should pass legislation making acts of enforced disappearance autonomous offences under criminal law that are punishable by appropriate penalties reflecting their extreme seriousness.

17. The criminal offence of enforced disappearance should include various modes of criminal liability, including in relation to any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance. It should also expressly provide for the application of command responsibility or superior individual criminal responsibility for such crime.

18. According to article 17 of the Declaration, acts constituting enforced disappearance shall be considered continuing offences as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified. Hence, another fundamental element of the needed legislation is the express provision that enforced disappearance is a continuous crime to which amnesties and immunities cannot be applied.

19. Turkey applies a statute of limitations of 20 years for crimes under which enforced disappearances are usually investigated and prosecuted, that is to say, murder, torture, or arbitrary deprivation of liberty. With respect to the application of the statute of limitations, it is stated in the Declaration that, when the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established (art. 17 (2) of the Declaration). Where they exist, statutes of limitations shall be substantial and commensurate with the extreme seriousness of the offence (art. 17 (3)), and shall be counted only starting from the moment at which light is shed on the fate or the whereabouts of the person. The Working Group notes that Turkey has recently abolished the application of the statute of limitations for the crime of torture[3] and encourages the Government to consider extending this provision to enforced disappearance once it is duly criminalized.

20. In any case, the statute of limitations cannot be applied in cases of enforced disappearance amounting to crimes against humanity.[4] However, Turkish law does not include acts of enforced disappearance in the definition of crimes against humanity. The Working Group urges the Government to include the practice of widespread or systematic enforced disappearances in the definition of crimes against humanity.

21. Another shortcoming that should swiftly be remedied is that Turkey is not party to the International Convention for the Protection of All Persons from Enforced Disappearance. The ratification of the Convention, together with recognition of the competence of the Committee on Enforced Disappearances to receive individual complaints under articles 31 and 32 of the Convention would be an important measure to address and prevent acts of enforced disappearance. As positive steps, the Working Group welcomes the modification of article 90 of the Constitution, according to which international human rights treaties ratified by Turkey prevail over national legislation in cases of conflict. It also notes that there is a right to lodge constitutional complaints in case of human rights violations, though access to this procedure seems to be limited.

[3] See CAT/C/TUR/CO/4, para. 5 (a).

[4] It is stated in art. 5 of the International Convention for the Protection of All Persons from Enforced Disappearance that: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law." See also A/HRC/13/31, para. 39.

V. Truth

22. The Working Group, in its general comment on the right to the truth in relation to enforced disappearances, stated that the right to the truth "means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrators" (see A/HRC/16/48, para. 39).

23. Numerous families in Turkey still do not know the truth about what happened to their loved ones as no mechanism has been created to search for the disappeared. There have been ad hoc and sporadic initiatives, such as the creation in 1997 of the rather ineffective Special Bureau to Investigate Allegations Concerning Missing Persons,[7] or the creation of a subcommission within the Human Rights Inquiry Commission of the Turkish Parliament which has investigated some cases,[8] but there has been no serious effort to comprehensively address the issue. It is urgent, also in light of the increasing age of relatives, witnesses and potential suspects, that the Government immediately adopt a comprehensive policy and a specific mechanism to search for all those who have disappeared, as was also previously recommended by the Special Rapporteur on extrajudicial, summary or arbitrary executions after his 2012 visit,[9] and to conduct investigations in compliance with the Model Protocol for a Legal Investigation of Extralegal, Arbitrary and Summary Executions (Minnesota Protocol) prior to the initiation of any criminal proceedings.

24. An immediate step to be taken promptly in the search process is to properly conduct exhumations and thoroughly investigate all identified burial sites, as already recommended by a number of international human rights bodies.[10] These sites should also be adequately preserved. The results of the few exhumations that have been carried out are unclear and the way in which they were conducted raises concerns, including in regard to the methods of excavation and the contamination of possible evidence.[11] According to information received by the Working Group during the visit, no exhumations had been conducted at burial sites since 2012.

25. The Working Group appreciates that the Council of Forensic Medicine of the Ministry of Justice has significantly increased its capacity and resources, including by establishing nine regional centres throughout the country. The Working Group hopes that this measure will serve to improve the quality of investigations in cases of enforced disappearances, including with respect to the exhumation of burial sites in which the Council of Forensic Medicine should take a more proactive role. The Working Group notes that there is the possibility of presenting forensic reports performed by institutions that are not government-affiliated, but that this is subject to a prosecutor's authorization.[12]

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[7] See E/CN.4/1998/62/Add.2, para. 47.

[8] The Working Group appreciates the information received after the visit by the Human Rights Inquiry Commission of the Turkish Parliament as a follow-up to the meeting held during the visit on the case of Cemil Kurbayir. However, in spite of the findings of the Commission that Mr. Kurbayir was tortured and killed during interrogation while in custody following the coup d'état in 1980 ... and the identification of the police officers allegedly responsible ... the criminal investigation resulted in a decision of non-prosecution. This decision was overturned on appeal in March 2014 and therefore the investigation is still pending.

[9] See A/HRC/23/47/Add.2, para. 115.

[10] See CCPR/C/TUR/CO/3, para. 11, and A/HRC/23/47/Add.2, paras. 54-57.

[11] See A/HRC/23/47/Add.2, paras. 97 and 115.

[12] On this issue, see also HRC/23/47/Add.2, para. 119.

26. The Working Group also emphasizes that access to archives is essential in order to secure the rights to truth and to justice. Turkey should develop a comprehensive plan for a system to preserve all existing records and documentation relating to human rights violations, including enforced disappearances. Access to archives, including those of military, the gendarmerie and the security and intelligence services should be guaranteed — notably to families for the purpose of the search for their loved ones, as well as to judicial authorities for the purpose of criminal investigation and prosecution.

27. The Working Group is aware that the passage of time means that, in many cases, the obligation to guarantee the truth may not result in the identification of every one of the victims individually. As the Working Group states in its general comment on the right to the truth in relation to enforced disappearances: "There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person." Thus, for disappearances that occurred decades ago, more efforts are needed in order to develop additional measures to duly investigate these cases and overcome challenges related to the passing of time, such as the scarcity of witnesses and of physical evidence.

28. In connection with the right to truth, the Working Group welcomes the information that the excavation teams of the Committee on Missing Persons in Cyprus[16] will have access to all 30 currently known suspected burial sites in military areas in the north of Cyprus.[17] This access is given over a three-year period, starting in January 2016, with 10 sites to be excavated each year.[18]

[16] The Committee on Missing Persons in Cyprus is a bicommunal body established in 1981 by the leaders of the Greek Cypriot and Turkish Cypriot communities with the participation of the United Nations. Following the establishment of an agreed list of missing persons, the Committee's objective is to recover, identify, and return to their families, the remains of 2,001 persons (493 Turkish Cypriots and 1,508 Greek Cypriots) who went missing during the intercommunal fighting of 1963 and 1964 and the events of 1974. For more information, see www.cmp-cyprus.org/about-the-cmp.

[17] In a Grand Chamber judgment delivered at Strasbourg on 10 May 2001 in the case of *Cyprus v. Turkey* (application No. 25781/94), the European Court of Human Rights found Turkey in violation of article 2 (right to life) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) concerning the failure of the authorities to conduct an effective investigation into the whereabouts and fate of Greek Cypriot missing persons who had disappeared in life-threatening circumstances, and of a continuing violation of article 5 (right to liberty and security) of the Convention concerning the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the Greek Cypriot missing persons in respect of whom there was an arguable claim of them being in Turkish custody at the time of their disappearance. In 2014, the Grand Chamber of the Court issued its judgment on just satisfaction in relation to this case, ordering the payment by Turkey of €30 million in respect of non-pecuniary damage suffered by relatives of the missing persons. See the Grand Chamber judgment on the question of just satisfaction in the *Cyprus v. Turkey* case, application (application No. 25781/94), 12 May 2014. See also the Grand Chamber judgment in the case of *Varnava and Others v. Turkey*, 18 September 2009 (applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), and CAT/C/TUR/CO/4, para. 21.

[18] See www.cmp-cyprus.org/press-releases/breakthrough-turkey-grants-access-to-30-.

VI. Justice

29. The Declaration on the Protection of All Persons from Enforced Disappearance requires that the State guarantee to victims effective remedies that include a thorough and impartial ex officio criminal investigation with a view to identifying those allegedly responsible for the disappearance, and imposition of the appropriate criminal penalties.

30. According to information received during the visit, investigation into a number of criminal cases involving an element of enforced disappearance has not yet been initiated or is still ongoing, despite the fact that in some cases more than 20 years have passed since the disappearances occurred. It is self-evident that finding evidence or any useful element for the investigation at this stage is quite difficult. The Working Group has received information that criminal investigations have been opened in 14 cases concerning the enforced disappearances of about 80 persons. Seven of these cases, concerning the disappearance of 34 people, reportedly resulted in acquittals; five of them, concerning the disappearance of 47 individuals, are pending, while only two cases, concerning two individuals, resulted in a decision of conviction. There are various reasons for the almost complete lack of criminal responsibility for acts of enforced disappearance.

31. First of all, given the absence of legislation making enforced disappearance an autonomous crime, acts of enforced disappearance are investigated and prosecuted under other crimes, such as murder, torture or arbitrary deprivation of liberty. This is a problem in terms of the specific investigation that is needed starting from the very first moments of the commission of the crime in order to properly investigate the enforced disappearance. In addition, and most importantly, criminal investigations and judicial proceedings are focused on offences defined as autonomous crimes in Turkish law, rather than on enforced disappearances, which are treated as aspects of those crimes. When strict legal standards of proof in cases of crimes such as murder or torture are not met, persons accused of — inter alia — committing enforced disappearances are acquitted or the cases are terminated.

32. Another consequence of the lack of an autonomous criminal offence of enforced disappearance is that, being prosecuted as elements of other crimes, acts of enforced disappearance are subject to the statute of limitations applicable to those crimes. The Working Group has been informed of a number of cases involving enforced disappearance which have been discontinued due to the expiration of the statute of limitations applicable to the crime under which the prosecution was launched.

33. During the visit, the Working Group heard a number of times about the passivity of the investigating and prosecuting authorities. This may result in situations where it appears as if it would be up to the relatives of disappeared persons to provide evidence to substantiate their loved ones' cases, rather than it being collected via a detailed and thorough investigation by the authorities. The Working Group also emphasizes that the delays in starting, conducting or concluding timely investigations do not exonerate State authorities from making the necessary efforts to comply with the obligation to secure the right to justice.

34. Indeed, the Working Group has perceived a palpable lack of interest in seriously investigating, prosecuting and adjudicating these cases, as if going forward with them would harm the interests of the State which should be instead preserved. In this respect, the Working Group considers the observations of the Special Rapporteur on the independence of judges and lawyers, after her visit to Turkey in 2011, to be quite illustrative and pertinent: "The impression gathered by the Special Rapporteur ... is that a State-centred mentality is rather prevalent in the Turkish judiciary, as the approach is often to favour or protect in the trial what are perceived to be the interests of the State. This situation, which is especially true in cases where the security of the State is felt to be at stake, may actually be

a danger (albeit very difficult to quantify or assess), notably in cases where the interests of the State and the rights of individuals may be considered to be conflicting. In this respect, a distinction must be drawn in order to avoid confusion between public and State interests; that is, the exercise of public interest functions, such as criminal prosecution, should not be conceived as having the role to protect the interests of the Government, a political party or any other State institution."[7]

35. Another challenge to achieving accountability is that a number of cases relating to enforced disappearances have been transferred, allegedly for security reasons, to courts that are geographically distant from locations where enforced disappearances have occurred and where the relatives of disappeared persons live. This dubious practice not only has obvious consequences on the effectiveness and the timely unfolding of the proceedings, but also hampers the participation of families and lawyers in the trials, thus de facto limiting access to justice, especially as there is no system in place to reimburse families who need to travel long distances to attend transferred trials.

36. The combination of all these factors makes convictions for acts of enforced disappearance virtually impossible and results in de facto immunity from criminal responsibility for perpetrators of crimes of enforced disappearance. The recent acquittals in a number of emblematic cases exemplify this pattern of impunity."[8]

37. The Working Group reiterated on many occasions that impunity for acts of enforced disappearance may be a source of future violations. The State should take decisive actions in this regard to ensure a fair, impartial and effective judicial process. The success of the country's judicial efforts will depend on strong determination to come to terms with the past, as well as a change of mindset in many State institutions, including among prosecutors and judges, whose impartiality and independence have often been questioned in relation to the lack of criminal responsibility for flagrant past human rights violations.

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[7] See A/HRC/20/19/Add.3, para. 56.

[8] On 21 May 2014, General Musa Çitil, who had been charged with the crime of "murdering more than one person due to the same reason" and was held responsible for the extrajudicial murder and forcible disappearance of 13 civilians and faced 13 consecutive life sentences without the possibility of parole, was finally acquitted. The case had been transferred to Çorum, a city in the middle of Anatolia, and the Çorum Second High Criminal Court rendered its decision of acquittal on the grounds that there was no tangible evidence beyond reasonable doubt to prove the alleged offences. Furthermore, General Çitil was promoted and was appointed Regional Commander of the Gendarmerie in Diyarbakır.

In November 2015, Colonel Cemal Temizöz, who had previously been indicted in relation to the enforced disappearance and extrajudicial execution of 21 persons between 1993 and 1995 and had been accused of "establishing an organization to commit crimes", "being a member of this organization", "incitement to murder" and "murder", was finally acquitted, six years after the first indictment in which he faced nine life sentences. Mr. Temizöz was cleared together with seven other defendants, including the former mayor of Cizre. The crimes of which the defendants were accused were believed to have been committed by the Gendarmerie Intelligence and Anti-Terror Unit (JITEM), an organization suspected of being responsible for many extrajudicial killings and enforced disappearances in Turkey. This case was also transferred, to a city in western Turkey, Eskişehir, far from the relatives of the victims. In January 2012, the Commissioner for Human Rights of the Council of Europe described the trial as "a unique opportunity to shed light on a period of systematic human rights abuses in south-east Turkey, which feature prominently in the case law of the European Court of Human Rights".

On 3 July 2015, General Mete Sayar, who had been charged with the crime of "murdering multiple persons", which included the enforced disappearance of six villagers in 1993, and who faced life imprisonment, was finally acquitted. His case had been transferred to Ankara, where the Ninth High Criminal Court issued an acquittal on the grounds that there was no tangible evidence beyond reasonable doubt to prove the alleged offences.

38. The Working Group notes with appreciation that a special interministerial unit/team has been created to follow up on the judgments made by the European Court of Human Rights. In this respect, the Working Group was informed by the authorities that the cases in which the European Court of Human Rights had found Turkey in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), notably on lack of effective investigation — including those relating to enforced disappearances that ended in an acquittal — could be reopened in accordance with the Code of Criminal Procedure. This is an important step, especially taking into account the fact that the European Court of Human Rights has found Turkey in violation of the European Convention on Human Rights in 51 applications concerning 102 individuals reportedly forcibly disappeared. Unfortunately, the Working Group has been informed that in some cases, investigations, following decisions by the European Court of Human Rights, have not been relaunched. The Working Group looks forward to seeing the results of the new investigations and trials.

39. The situation of lawyers, including those working on cases of enforced disappearance, is particularly worrisome. The Working Group received information about the arrest, detention and prosecution on terrorism-related charges of lawyers defending individuals accused of terrorism-related crimes, mostly on the grounds of an alleged link to, or the provision of support for, their clients' alleged criminal activities.[7] This is inadmissible in a democratic society governed by the rule of law and is particularly concerning in the light of the increasingly broader and more vague definition of terrorism and of "illegal organizations".

40. The Working Group also received information on threats and intimidation against human rights defenders and lawyers working on enforced disappearance cases, sometimes even during hearings in courts.

41. The Working Group recalls that, in accordance with articles 13 (3) and (5) of the Declaration, all involved in the investigation of cases of enforced disappearance shall be protected against ill-treatment, intimidation or reprisal, and steps shall be taken to ensure that any such act on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

VII. Reparations and memory

42. All victims of enforced disappearance and their relatives have the right to full reparation, which includes compensation, satisfaction, restitution, rehabilitation and guarantees of non-repetition, as provided for in article 19 of the Declaration.

43. The Working Group recalls that, in a case of enforced disappearance, the victim is not only the person who disappears, but also any other person, in particular the next of kin, who suffers harm as a consequence of the disappearance. Relatives endure pain and anguish as a consequence of the continuous uncertainty about the fate and whereabouts of their loved ones.

44. The Working Group also underlines that the obligation to provide redress to victims of enforced disappearance is not limited to the right to monetary compensation; it also includes, inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage, as well as legal and social rehabilitation, guarantees of non-

[7] On this matter, see also A/HRC/20/19/Add.3, para. 65.

repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.[37]

45. The Working Group notes that the frequent stigmatization of relatives of the disappeared as terrorists or terrorists' supporters rather than as victims is a matter of concern and goes in the opposite direction to that required for their full rehabilitation and recovery.

46. Within the scope of the right to reparation in the case of enforced disappearance, the family of the disappeared person has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted.

47. The Working Group received little information on reparation programmes for relatives of the disappeared, most likely because such programmes do not seem to exist. During some official meetings, the Working Group was informed that only victims of terrorism receive compensation from the State. In practice, reparation is linked to the positive outcome of a related judicial case: there is no other form of reparation outside the context of a judicial proceeding.

48. The Working Group was also informed that there is a compensation committee within the Ministry of Justice which grants compensation awarded by the European Court of Human Rights for cases in which the Court has found Turkey to be in violation of the European Convention on Human Rights.

49. The Working Group's experience during its country visits has frequently been that measures intended to help relatives cope with the consequences of the absence of the disappeared person are often assimilated to measures of reparation. However, measures that provide for social assistance should be independent and should not prejudice the obligation of the State to provide reparation to victims as a consequence of the violation of their rights. In addition, social allowances and/or measures of reparation should not be made conditional on the requirement that the relatives of the disappeared person produce a death certificate. Instead, a declaration of absence should be issued after an enforced disappearance when there is no proof of the death of the disappeared person, in order to support relatives while at the same time allowing them to continue searching for their loved one.[38] In its general comment on article 19 of the Declaration, the Working Group made it clear that, in principle, no victim of enforced disappearance shall be presumed dead over the objections of the family.[39]

50. The Working Group recommends that any policy adopted in the area of reparation, truth and justice take a gender perspective. In Turkey, as in most of the countries where enforced disappearances have occurred, women are often those who are left behind and suffer the most from the economic and social consequences of the enforced disappearances of their loved ones. The Working Group recommends in this regard that the Government follow the standards developed in its general comment on women affected by enforced disappearances (A/HRC/WGEID/98/2).

51. In the light of political reluctance to come to terms with past enforced disappearances, it is not unexpected to note the absence of official memorial sites or remembrance places in Turkey. There is no place for the relatives to gather to remember their loved ones. The Working Group has also been informed of instances of harassment

[37] See A/HRC/22/45, para. 53.
[38] See A/HRC/22/45, para. 50.
[39] See E/CN.4/1998/43, para. 74.

during demonstrations of families of the disappeared. The Working Group stresses the importance of State-sponsored memorials and of the support of the State for civil society remembrance initiatives. The establishment of memorial sites and monuments contributes to collective social recognition of the violations that have occurred, as well as to the rejection and repudiation of these violations, which could also serve as a preventive measure. The establishment and maintenance of memorial sites should be a responsibility of the State, with the close participation of the relatives of the disappeared and other parties concerned.[47]

VIII. Prevention of enforced disappearances

Awareness-raising and human rights education

52. In order to prevent recurrence of enforced disappearances, it is essential to properly educate generations to come about the past and to provide society in general, and civil servants in particular, including migration officials, with adequate training in human rights. The Working Group emphasizes the importance of including the necessary education and information regarding the relevant provisions of the Declaration in the training given to law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty. Training for judges, prosecutors and lawyers is equally important.

Respect of procedural safeguards

53. As a preventive measure, articles 10 to 12 of the Declaration require that deprivation of liberty must be carried out in strict compliance with national and international human rights standards. In this respect, the Working Group is concerned at a number of provisions contained in several pieces of Turkish legislation, notably as a consequence of two major "package" laws passed by Parliament in March 2015 containing provisions that tighten the Government's control over national and public security in the country.

54. Certainly problematic are the provisions contained in Law No. 6638,[48] which contains the Law on Amending the Police Powers and Duties Law, the Law on the Gendarmerie's Organization, Duties and Powers, and other laws. Law No. 6638 amends more than a dozen laws, with the longest sections being amendments to articles 21-33 of the Police Organization Law and to articles 34-46 of the Police Higher Education Law. The amendments in the first 20 articles of Law No. 6638 affect the Police Powers and Duties Law, the Law on the Gendarmerie's Organization, Duties and Powers, the Law on Meetings and Demonstrations, the Anti-Terror Law, the Criminal Code, the Code of Criminal Procedure, the Provincial Administration Law, the Compensation for Terrorism Law and the Identification Notification Law. These amendments enhance the power of the police to conduct searches, notably giving the police the authority to detain persons for 24 hours without a warrant for crimes involving force and violence committed during public events — that is, for some ten types of offences listed in the Criminal Code, crimes listed in the Anti-Terror Law, and certain offences listed in the Law on Meetings and Demonstrations, among others. The new provisions also empower governors to assume some of the authority of prosecutors, for example to authorize the police to find the

[47] See A/HRC/22/45, para. 64.

[48] See www.loc.gov/law/help/national-security-law-turkey.php.

perpetrators of crimes. If the crime is "collective" — for example, involving mass demonstrations — police officers may hold persons in custody for up to 48 hours without the authorization of a judicial authority.[27] The Working Group considers that this is too long a period without a warrant and recalls that the first hours and days after the deprivation of liberty are when abuses usually occur, including enforced or involuntary disappearances.

Non-refoulement of refugees

55. It is stated in article 8 (1) of the Declaration states that "no State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance". In this respect, the Working Group expresses serious concern about the information received of a high number of mass returns of Syrian refugees from Turkey, notably since January 2016, and about the allegation of the use of violence by border guards, including the use of live ammunition, to prevent Syrian nationals, including children, from entering Turkey from the Syrian Arab Republic. Both the Committee against Torture and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have recently expressed concern about these issues when considering the respect by Turkey of its obligations under the respective conventions.[28]

56. The Working Group emphasizes that it is specified in the Declaration that, for the purpose of determining whether there are grounds to believe that, if returned, a person may be in danger of enforced disappearance, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. It appears palpable that, as very widely documented,[29] the situation in the Syrian Arab Republic facilitates the occurrence of enforced disappearance and exposes the refugees returned there to a great risk. In this connection, the Working Group urges the Turkish authorities to comply with the provisions of the Declaration and of other applicable human rights norms and standards.

Human Rights and Equality Institution

57. The Working Group is concerned by the recent legislative reform, on 6 April 2016, paving the way for changes to the national human rights institution in Turkey — the Human Rights and Equality Institution — which will encompass the national preventive mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and an equality commission. According to the information received, the institution will hardly comply with international standards, particularly the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles), with eight of its board members being appointed by the Council of Ministers and three being appointed by the President.[30] The Chair and the Deputy Chair will be elected by the board from among its members. The Working Group is concerned that the accessibility of the institution will be limited by the absence of local or regional offices. Finally, concerns have been expressed about lack of

[27] See art. 13 of Law No. 6638.

[28] See CAT/C/TUR/CO/4, para. 23, and CMW/C/TUR/CO/1, paras. 41 (b), 53 and 54. See also www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/.

[29] See, for instance, A/HRC/24/46, paras. 67-74.

[30] See also CAT/C/TUR/CO/4, paras. 27 and 28.

clarity of mandates and the resulting overlapping of functions of institutions active in the field of human rights, namely those of the Human Rights and Equality Institution, the Ombudsman and the Parliamentary Inquiry Committee. The Working Group regrets that it could not meet with representatives of the institution. It expects, however, that the issues related to past enforced disappearances will feature prominently in its agenda.

IX. Conclusions

58. **Turkey needs to come to terms with past disappearances, and it needs to do so in a comprehensive manner, fully addressing them. This should be the result of a clear State policy recognizing what happened and proposing a systemic solution with regard to all aspects related to enforced disappearances, namely truth, justice, reparation, memory and guarantees of non-repetition. Enforced disappearance cannot be considered as an issue of the past. It is a continuous crime until the fate and the whereabouts of every disappeared person is clarified.**

59. **Important challenges remain to comprehensively addressing past enforced disappearances and preventing their recurrence in the future: enforced disappearance has not yet been introduced in the legislation as an autonomous crime, there are virtually no cases of criminal responsibility, the fate and the whereabouts of many disappeared persons is still unknown, and many of the burial sites have not yet been investigated.**

60. **Given the lack of progress on any aspect related to past disappearances, the full recognition of the past violations and the creation of an extrajudicial mechanism specifically dedicated to fully investigating the fate and the whereabouts of those who disappeared during the 1980s and 1990s has become essential and urgent, in order to finally provide truth, justice and reparation to the families.**

61. **The Working Group is concerned at the current situation in the south-east of the country, where a wide security operation has been in place since July 2015. Although during the visit the Working Group did not receive allegations of recent enforced disappearances,[6] its experience unfortunately suggests that situations such as the current one in the south-east are conducive to human rights violations, including enforced disappearances. Only a thorough, independent and credible investigation may clarify facts and dispel any doubts as to the nature and extent of the violations occurring on the ground.**

62. **The Working Group firmly believes that in the current environment it is even more important to come to terms with past violations, as reluctance to do so could actually become the source of further violations both in the present-day environment and in the future.**

63. **The Working Group reiterates its willingness to continue its constructive dialogue with the Turkish authorities and offers its unreserved support for the full implementation of the Declaration on the Protection of All Persons from Enforced Disappearance.**

X. Recommendations

64. **In the light of the above, the Working Group formulates the following recommendations for the Government of Turkey:**

General

65. **Recognize the enforced disappearances of the past and adopt a comprehensive policy to fully address them in all relevant areas in order to guarantee the victims' rights to truth, justice, reparation and guarantees of non-recurrence, through both a strengthened judicial system and a newly created extrajudicial mechanism.**

66. **Undertake a thorough and impartial investigation into all allegations of human rights violations in the context of the current security operations in the south-east, including of families not being able to have access to the bodies of their killed loved ones and of bodies being disposed of.**

67. **Thoroughly and independently investigate allegations of disappearances of migrants in, or transiting through, Turkey, including reports of women and children disappearing in trafficking networks when being trafficked from the Syrian Arab Republic to Turkey.**

Legislation

68. **Swiftly make enforced disappearance an autonomous offence punishable by appropriate penalties that reflect its extreme seriousness. The offence should also cover the various modes of criminal liability, including committing, ordering, soliciting or inducing the commission of, attempting to commit, being an accomplice to, and participating in, an enforced disappearance. It should also expressly provide for the application of command responsibility or superior individual criminal responsibility for such crime, and contain the explicit provision that enforced disappearance is a continuous crime to which amnesties and immunities cannot be applied. Furthermore, it should include the practice of widespread or systematic enforced disappearances in the definition of crimes against humanity to which the statute of limitations does not apply.**

69. **Adopt without delay comprehensive legislation on enforced disappearances, which should provide, inter alia, for:**

(a) **A specific procedure for filing complaints with regard to enforced disappearances;**

(b) **A mechanism for investigation and verification of reported cases of enforced disappearance;**

(c) **A national register of forcibly disappeared persons, and of reported and discovered burial sites;**

(d) **Full access to the above-mentioned register for relatives, lawyers, human rights defenders and any other concerned person;**

(e) **Introduction of the declaration of absence following the enforced disappearance, making certain that the issuance of certificates of absence will not terminate the rights of victims' families to pursue truth and justice and will cover all disappearances regardless of the time of their occurrence;**

(f) **Full protection and support for the relatives of disappeared persons and witnesses;**

(g) **The right to full reparation, including compensation.**

70. **Ratify the International Convention for the Protection of All Persons from Enforced Disappearance without delay and without reservations and recognize the competence of the Committee on Enforced Disappearances in accordance with articles 31 and 32 of the Convention.**

Truth

71. **Adopt immediately a comprehensive policy to address disappearances, which would include the creation of an extrajudicial mechanism specifically devoted to searching for those who have disappeared. This body should be composed of independent and professional personnel and should be set up through a comprehensive consultative process with all the stakeholders involved. It should also be granted dedicated and sufficient human and financial resources as well as ample powers to accept and review complaints from relatives and to properly investigate and make recommendations for possible criminal prosecutions. Furthermore, it should be equipped with the technical capacity to conduct exhumations, including forensic expertise.**

72. **Ensure the proper investigation of existing burial sites, the proper preservation of the sites and the protection of the samples' chain of custody.**

73. **Be proactive in the proper investigation of existing burial sites and in the identification of new ones.**

74. **Examine without undue delay all locations of potential mass graves and establish a mapping of all burial sites.**

75. **Establish a register with the exact or approximate number of disappeared persons.**

76. **Create a national DNA bank to which families can send samples.**

77. **Immediately open archives, including military archives, that are relevant to cases of enforced disappearance, in order to facilitate the finding of undiscovered gravesites and speed up the search for missing persons.**

78. **Promulgate a law on access to information and a proper legislative framework on archives, so as to guarantee full access to all information that could potentially lead to clarification when investigating cases of disappeared persons.**

79. **Continue cooperating with the humanitarian mandate of the Committee on Missing Persons in Cyprus and activate the process of access to burial sites to support the families affected through return to them of the remains of their missing relatives.**

Justice

80. **Guarantee that criminal investigations into enforced disappearances are carried out from the beginning by highly professional and independent teams of prosecutors, investigators and forensic experts.**

81. **Equip investigative teams and courts with the necessary means and resources to handle cases of enforced disappearance.**

82. **Prosecute all cases of enforced disappearance, regardless of the perpetrator and of the time when they were committed.**

83. Investigate the perpetrators and instigators of such crimes, as well as those hierarchically accountable under the principle of command responsibility.

84. Take appropriate measures to fully ensure the protection of relatives and witnesses throughout the proceedings, including by fostering conditions and providing incentives to encourage more witnesses to furnish crucial information.

85. Reconsider the practice of transferring trials to geographically distant courts, in order to maximize effectiveness, reduce delays and improve access to justice for families.

86. Guarantee access to justice for relatives when the cases of their loved ones are moved to geographically distant courts, including by considering reimbursing expenses incurred for attending the hearings.

87. Take measures to tackle intimidation and harassment of relatives, human rights defenders and lawyers working on cases of enforced disappearance, including punishing those responsible for such acts, in accordance with articles 13 (3) and (5) of the Declaration.

88. Ensure that lawyers are not subject to criminal or any other sanctions for the mere fact of defending clients accused of terrorism-related crimes.

Reparations and memory

89. Urgently develop a national reparation programme that includes compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition for all victims of human rights violations, including enforced disappearance, without discrimination. Social and psychological support for victims should be a key component of this national reparation programme.

90. Establish a system for providing for social allowances or appropriate social and medical measures for relatives of disappeared persons in relation to the physical, mental and economic consequences of the absence of the disappeared.

91. Take a gender perspective in all policies in the area of reparation, truth and justice, following the standards developed by the Working Group in its general comment on women affected by enforced disappearances (A/HRC/WGEID/98/2).

92. Sponsor memorials as well as support civil society remembrance initiatives, including their proper maintenance through public funds.

93. The design of such monuments and the planning and conducting of commemoration events should be carried out in consultation with victims' families and other stakeholders.

Awareness-raising and other preventive measures

94. Include the relevant provisions of the Declaration in the training given to military personnel and the police and to medical personnel, public officials, migration officials and other persons who may be involved in the custody or treatment of any person deprived of liberty.

95. Guarantee to all persons deprived of their liberty the rights recognized in the Declaration and in other relevant international instruments.

96. **Abolish the provisions giving the police under certain circumstances the authority to detain persons for up to 48 hours without the authorization of a judicial authority.**

97. **Ensure strict adherence by the relevant authorities to the applicable procedures for extradition, return and expulsion, and in particular, guarantee evaluation on a case-by-case basis in order to establish whether there are grounds for believing that the person could be subjected to enforced disappearance.**

98. **Fully comply in this respect with article 8 (1) of the Declaration, in which it is specified that "no State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance".**

National human rights institution

99. **Ensure the independence and impartiality, both formal and substantial, of the forthcoming national human rights institution, in conformity with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). The national human rights institution should have competence to monitor and address issues related to enforced or involuntary disappearances.**

100. **Ensure transparency and consultation with civil society in the activities of the newly established national human rights institutions.**

101. **Facilitate access for victims to the national human rights institution by creating regional and local offices.**

102. **The Working Group invites the Government of Turkey to submit, within 90 days of the date of presentation of the present report to the Human Rights Council, a timetable showing the steps that it will take to implement the recommendations of the Working Group.**